No. 76-315

In the Supreme Court of the United States

OCTOBER TERM, 1976

**ESTATE OF WESLEY A. STEFFKE,
WISCONSIN VALLEY TRUST COMPANY and
PRISCILLA BAKER (LANE) STEFFKE, Co-executors,**
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEONARD F. SCHMITT
Attorney for Petitioners

P.O. ADDRESS:

P.O. Box 32
121½ South Mill Street
Merrill, Wisconsin 54452
Tel. AC 715-536-8371

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Petitioners,

vs.

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Respondent.

PETITION BY (PLAINTIFFS) PETITIONERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO REVIEW ITS JUDGMENT IN THE ABOVE.

OPINIONS BELOW

The opinion of the Court of Appeals not yet reported is set out at Appendix A, App. pp. 1-15. The opinion of the Tax Court is reported at 64 T.C. No. 50 and set out in Appendix B, App. pp. 16-31.

JURISDICTION

The judgment of the Court of Appeals was entered June 24, 1976. Jurisdiction to review the judgment in question is conferred on this Court by 28 U.S.C. 1254(1).

QUESTION PRESENTED

What effect is to be given a foreign divorce decree for purposes of administration of the Federal Estate Tax Laws (specifically the allowance of the marital deduction under Sec. 2056a IRC 1954) where the state of domicile has refused to recognize such decree and where full faith and credit does not apply.

STATUTE INVOLVED

Section 2056a IRC 1954 (26 U.S.C. 2056a) provides:

> "(a) Allowance of marital deduction.
>
> For purposes of the tax imposed by Section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c) and (d), be determined by deduction from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate."

STATEMENT

(The facts are all undisputed and were stipulated.)

Priscilla Lane, the claimed surviving spouse, at all times domiciled in Wisconsin, obtained a bi-lateral divorce from her husband in Mexico. Thereafter she married deceased in Wisconsin. After deceased died the Wisconsin Supreme Court in a state inheritance tax proceeding (Est. of Steffke, 65 Wis. (2) 199, 222 N.W. (2) 628) refused on

grounds of state policy to recognize the Mexican divorce and held Priscilla Lane was not the lawful widow of deceased under Wisconsin law. The Mexican Court which granted the divorce decree never revoked it.

Based upon the foregoing the Commissioner disallowed the marital deduction on the ground Priscilla Lane was not the "surviving spouse" of deceased within the meaning of the above statute and assessed the deficiency. The Tax Court sustained the Commissioner and the Court of Appeals affirmed. Jurisdiction is in the Court of Appeals under Title 28 Sec. 2072; FRAP 13.

REASONS FOR ALLOWING THE WRIT

The question presented raises an issue of greatest importance beyond the precise question of the marital deduction presented in this *estate* tax case in that the circuits which have considered the question to date recognize foreign and ex parte sister state divorce decrees as valid in order to achieve *uniformity* in the administration of the federal *income* tax laws but not to achieve *uniformity* in the administration of the federal *estate* tax laws.

With respect to *income* taxes the Second Circuit in *Borax* v. *Comm.,* 349 F. 2d 666 (1965); Cert. denied, 383 U.S. 935 (1966), laid down what it called a "rule of validity". It held that a Mexican ex parte divorce denied recognition by N.Y., the state of domicile, was nonetheless valid until invalidated by the jurisdiction that decreed it, for income tax purposes permitting the husband to file a joint return with the second wife as his "spouse" under Sec. 6013(a) IRC 1954. (See Appendix D, App. p. 40 for Code)

It said: (p. 670)

> "We hold . . . the subsequent declaration of invalidity by a jurisdiction *other than the one that decreed the divorce is of no consequence under these provisions (income tax) of the tax laws.*
>
> This rule of validation tends to promote some measure of certainty and *uniformity*—important goals of the federal tax scheme . . . By *depriving the determination of invalidity* of *any federal tax significance* the *rule of validation avoids a measure of unevenness and uncertainty:* all those taxpayers who have obtained a divorce in a particular jurisdiction are treated the same, regardless of whether the spouse

> against whom the decree has been obtained is able to, and does, invoke the power of another jurisdiction to declare that divorce invalid." (Emph. Supp.)"

The Third Circuit in *Feinberg* v. *Comm.,* 198 F. 2d 260 (1952) recognized the validity of such divorce decrees for income tax purposes. It held: (p. 263)

> "The mere fact that the marital domicile of the parties did not recognize the Florida divorce does not render it a nullity for federal income tax purposes."

However, in *Goldwater* v. *Comm.,* (Op. set out at Appendix C, App. pp. 32-39) on facts identical to Borax, the Second Circuit held the rule did not apply in administration of the *estate* tax laws. It now held a N.Y. (state of domicile) decree declaring a Mexican divorce void had to be respected and there was no legal "spouse" and no marital deduction permitted under Section 2056(a) IRC 1954. (Appendix C, App. p. 37).

(In *Goldwater* the Second Circuit attempted to claim its opinion in *Borax* was limited to the income tax provisions relating to "alimony deductions" totally ignoring the fact that in *Borax* it *also held* the Mexican divorce valid and the second wife a "spouse" for the purpose of entitling the taxpayer to file a joint return under Sec. 6013(a) IRC 1954.)

In the instant case the facts are identical to *Borax* and *Goldwater*—except the divorce here was bilateral. The Seventh Circuit in its decision herein basically distinguishes *Borax* on the ground that it was an *income* tax case.

On the question at issue, it held:

> "When there are *conflicting judicial decrees* regarding the *validity of a divorce,* the decision should be followed for *federal estate* taxation purposes that

would be followed by the state which has primary jurisdiction over the administration of a decedent's estate, i.e., the jurisdiction in which the decedent was domiciled at the time of his death." (Emph. Supp.) (Op. Appendix A, App. pp. 9-10)

This attempt by the circuits to apply *uniformity* in the administration of the *income* tax laws but not the *estate* tax laws is totally wrong and contrary to the intent of Congress.

This Court has recognized that *uniformity* in the administration of *estate* taxes was the intent of Congress, at least between community property and common law states. In *U.S.* v. *Stapf,* 375 U.S. 118, it stated: (p. 128)

> "The 1948 tax amendments were intended to *equalize* the effect of the *estate* taxes in community property and common law jurisdictions." (Emph. added)

With this concern of Congress for *uniformity* in *estate* as well as *income* tax treatment between residents of common law and community property states it is compelled by logic and reason to assume Congress likewise intended there be *uniformity* of treatment in the administration of *all* tax laws as between residents of *comity* states and residents of *non-comity* states.

The Second Circuit in *Borax* (involving income taxes) clearly recognized this problem re comity and non-comity states when it stated (p. 670):

> "Where, as here, the divorcing jurisdiction is not one of the States of the Union, and the decree has only the benefit of *comity* rather than the Full Faith and Credit Clause of the Constitution, the *states are free to take different views as to the validity of the divorce.*" (Emph. Supp.)

That the *Borax* Court was right in recognizing the foreign divorce decree and prohibiting the *differing* views of *different state courts* from controlling the imposition of the income tax is demonstrated by the consistency and finality with which this Court has held that state laws and *Court decisions* cannot control in the application of Federal tax laws.

In *Lyeth* v. *Hoey,* 305 U.S. 188, 194 (an income tax case) this Court said:

> "Whether what an heir receives from the estate of his ancestor through the compromise of his contest of his ancestor's will should be regarded as within the exemption from the Federal tax should not be decided in one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Mass. or N.Y., *according to the differing views of the state courts.* We think it was the intention of Congress in establishing this exemption to provide a uniform rule." (Emph. Supp.)

And in *Comm.* v. *Tower,* 327 U.S. 280, 287-288, also an income tax case, it held:

> "But the Tax Court in making a final authoritative finding on the question whether this was a real partnership is not governed by how Michigan law might treat the same circumstances for purposes of state law. Thus, Michigan could and might decide that the stock transfer here was sufficient under state law to pass title to the wife, . . . *But Michigan cannot by its decisions and laws governing questions over which it has final say, also decide issues of federal tax law . . .*" (Empl. Supp.)

The Seventh Circuit in the instant case and the Tax Court, in order to justify applying a different rule in determining "spouse" status in respect to the marital deduction than the "rule of validity" applied in *Borax* to determine "spouse" status in respect to filling a joint return under the income tax law stress the instances where

state law is looked to in the administration of the estate tax laws, i.e. heirship, dower rights, homestead rights, etc.

These are all beside the point. These are *static* property situations and can only be settled by the law of the domicile. *No judgment of a foreign jurisdiction can or does intervene as in the case of the marital relationship and no question of uniformity of tax treatment is involved.* Moreover, nowhere in the Code is there any statement or indication that marital status should be determined in accordance with the laws of the state of domicile.

In *Stapf,* supra, this Court granted certiorari to "consider question of statutory interpretation *important to the administration of the federal estate tax laws".* (Emph. Supp.) That case concerned the value of an "encumbered" bequest for marital deduction purposes.

We submit the question here presented rises to equal importance.

Because of the highly mobile nature of our society it is common knowledge that the marriage res may be carried from state to state and to foreign jurisdictions by either party to the contract with foreign divorce decrees resulting. Permitting the states to take "differing views" on the effect to be given such decrees results in the anomalous and unjust situation that a widow residing in Beloit, Wisconsin (a non-comity state) is denied a marital deduction while a widow across the street in South Beloit, Illinois is granted such deduction were Illinois to grant comity. Likewise in thousands of border cities in the United States.

In the past it was necessary for this Court in a line of cases beginning with *Williams I,* 317 U.S. 287 through *Cook* v. *Cook,* 342 U.S. 126 to settle the question of the entitlement to "full faith" under the constitution of bilateral divorces granted by sister states.

Likewise this Court should now settle the important question of the effect to be given an ex parte divorce of a sister state or a foreign decree in the administration of *all* federal taxes—*income* as well as *estate* and *gift* taxes. In the absence of such determination the uneven and discriminatory assessment of all taxes will, because of the continuing large number of foreign divorces and *ex parte divorces obtained in sister states,* continue to despoil and discredit the tax system of the United States. As an added blight it will encourage the evil of forum shopping for tax advantage.

The point we ask this Court to settle is strictly limited to the effect to be given a foreign divorce decree in the administration of the federal tax laws. The determination of that question will in no way impugn the right of a state to determine the marital status of its domiciles. It will only settle a very important point in the administration of the Federal tax laws.

CONCLUSION

For the foregoing reasons petitioners respectfully pray that this Court grant a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals in this case.

Respectfully submitted,

Leonard F. Schmitt
Attorney for Petitioners

P. O. ADDRESS:
121½ South Mill Street
Merrill, Wisconsin 54452
Tel. AC 715-536-8371

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-2161

ESTATE OF WESLEY A. STEFFKE, Deceased,
WISCONSIN VALLEY TRUST COMPANY and
PRISCILLA BAKER (LANE) STEFFKE,
co-executors,

Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

On Appeal from the Decision of the
United States Tax Court
No. 4834-73
C. MOXLEY FEATHERSTON, *Judge.*

ARGUED APRIL 16, 1976 — DECIDED JUNE 24, 1976

Before FAIRCHILD, *Chief Judge*, PELL, *Circuit Judge*, and NOLAND, *District Judge.**

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* Honorable James E. Noland, United States District Judge from the Southern District of Indiana, is sitting by designation.

PELL, *Circuit Judge.* The issue in this appeal from a judgment of the Tax Court is the meaning of the term "surviving spouse" as used in section 2056(a) of the Internal Revenue Code of 1954.[1]

The facts in this case are undisputed. In 1944 Priscilla Baker married Crockett W. Lane. At all relevant times they resided in Wisconsin. In 1966 she obtained a judgment of divorce in a Mexican court. Before obtaining this judgment, she entered a personal appearance and complied with the jurisdictional requirements prescribed by Mexican law. Crockett did not go to Mexico but appeared through counsel. The judgment was based on grounds not recognized under Wisconsin law, but it has never been set aside by the Mexican court which entered it. In January of 1967, the decedent, Wesley Steffke, executed a will which provided that the bulk of his estate would pass to his "friend, Priscilla Baker Lane." In July of that year Priscilla and decedent were married. The decedent died in November of 1968. Following his death, the Supreme Court of Wisconsin was presented with the question of whether the property passing to Priscilla should be taxed under the Wisconsin inheritance tax at rates applicable to widows or at rates applicable to strangers. In deciding this issue, the Wisconsin Supreme Court held that the Mexican divorce was of no effect in the state of Wisconsin and that Priscilla was not the wife of decedent under the laws of Wisconsin. *In re Estate of Steffke,* 65 Wis. 2d 199, 222 N.W.2d 628 (1974).

The decedent's estate claimed the marital deduction under section 2056 on the estate tax return. The Commissioner disallowed the deduction on the grounds that Priscilla was not decedent's surviving spouse. The estate petitioned the Tax Court to determine the issue, and in due course the court ruled in favor of the Commissioner.[2] This appeal followed.

[1] All statutory citations in this opinion are to the Internal Revenue Code of 1954, 26 U.S.C., unless otherwise indicated.

Section 2056 allows the deduction from a decedent's gross estate of an amount equal to the value of any interest in property passing from a decedent to a surviving spouse to the extent the interest is not a terminable one and to the extent the value of the interest passing does not exceed fifty percent of the adjusted gross estate. The term "surviving spouse" is neither defined in the section nor elsewhere in the Internal Revenue Code.

The meaning of the words or the legal status of circumstances for federal tax purposes need not be identical to their meaning or their legal effect under state law. *See Commissioner* v. *Tower,* 327 U.S. 280 (1946); *Lyeth* v. *Hoey,* 305 U.S. 188 (1938). In *Lyeth* the Supreme Court indicated that it is the will of Congress that controls the meaning of the taxation statutes and that in the absence of language evidencing a different purpose, the statutes should be interpreted so as to produce a uniform result nationwide. According to the Court, state law can only control "when the federal taxing act by express language or necessary implication makes its operation dependent upon state law." 305 U.S. at 194.

The taxpayer's principal argument in this case is that uniformity can best be achieved by applying the holdings of *Borax* v. *Commissioner,* 349 F.2d 666 (2d Cir. 1965), *cert. denied,* 383 U.S. 935 (1966); *Wondsel* v. *Commissioner,* 350 F.2d 339 (2d Cir. 1965); and *Feinberg* v. *Commissioner,* 198 F.2d 260 (3d Cir. 1952). These cases were

[2] The opinion of the Tax Court is reported at 64 T.C. 530.

income tax cases, but the taxpayer argues that the same logic and principles apply in the estate tax context.

In *Borax* the Commissioner asserted deficiencies for the years 1952 through 1955 and 1957 against Herman and Hermine Borax, who had filed joint returns and had deducted payments made by Herman to his former wife, Ruth. Herman and Ruth had separated by mutual consent in 1946 and had entered a separation agreement. In August 1952, Herman obtained a divorce in Mexico. Ruth did not appear in the Mexican proceedings. Later that month Herman married Hermine. In 1953 a New York court entered a decree declaring that Ruth was the lawful wife of Herman, that Herman and Hermine were not husband and wife, and that the Mexican divorce decree was invalid and of no force or effect. The New York court had jurisdiction over Herman and Hermine. Each had been personally served and participated in the New York proceedings with counsel. In deciding the case, the Second Circuit established a rule that it characterized as a rule of validation. The rule provided:

> The subsequent declaration of invalidity [of a divorce] by a jurisdiction other than the one that decreed the divorce is of no consequence under these provisions of the tax law.

349 F.2d at 670. The court first pronounced the rule when discussing the issue of the deductibility of payments made in discharge of a legal obligation incurred incident to a divorce, but it later applied the rule to allow Herman and Hermine to file joint returns. The court indicated that the rule tended to promote uniformity because all persons who obtained a divorce in a particular jurisdiction would be treated in the same way under it regardless of whether someone invoked the power of another jurisdiction to have the decree declared invalid.

In *Wondsel* the same court reached a similar result on similar facts. The divorce not recognized by New York in *Wondsel* was granted by Florida rather than a foreign country but was not entitled to full faith and credit because the New York court found that the Florida court lacked jurisdiction.

Feinberg also involved the deductibility of payments made incident to a divorce decree. *Feinberg* was decided by the Third Circuit before the Second Circuit annunciated its rule of validation, but the court reached the same result. It indicated that the mere fact that the marital domicile of the parties did not recognize a Florida divorce did not render it a nullity for federal income tax purposes.

These decisions have not received a favorable reception from either the Commissioner or the Tax Court, at least where taxpayers have tried to extend the holdings to an estate tax situation.

In Rev. Rul. 67-442, 1967-2 Cum. Bull. 65, the Commissioner indicated that the Service would not follow *Borax* and *Wondsel* for estate tax purposes. The ruling indicated that the Service would not question a divorce decree unless it had been declared invalid but that if a decree were declared invalid by a court with jurisdiction over the parties, the Service would follow the later decision. This appears to have been the consistent view of the Service. In *Feinberg* the Third Circuit indicated that General Counsel Memorandum 25250, 1947-2 Cum. Bull. 32, supported its position. In the Memorandum the General Counsel indicated that a taxpayer could deduct alimony payments which were paid on the basis of a separation agreement but after a Mexican divorce was obtained by one of the parties.[3]

[3] At the time the Memorandum was issued, payments of the nature involved could be deducted after divorce. Separation was not sufficient.

Under the facts posited, it appeared unlikely that the divorce would have been recognized by the taxpayer's state of domicile; but the divorce had not been declared invalid, and the parties relied on the decree by remarrying. The Service indicated in Rev. Rul. 67-442, as it had in Rev. Rul. 57-113, 1957-1 Cum. Bull. 106, that the Memorandum was not intended to recognize Mexican decrees over subsequent decrees in other jurisdictions. The Second Circuit in *Borax* indicated that the Commissioner had taken a position in Rev. Rul. 58-66, 1958-1 Cum. Bull. 60, which conflicted with his position in that case. In Rev. Rul. 58-66 the Commissioner indicated that the marital status of individuals as determined by state law would be recognized for federal income tax purposes. It then applied this rule to the situation where parties initiate a common law marriage in a state which recognizes such a relationship and later move to a jurisdiction which requires a ceremony. It held that such persons may take the dual allowance for personal exemptions and file a joint return. We do not conceive that this Rev. Rul. conflicts with the position taken by the Commissioner in the present case.

The Tax Court has distinguished *Borax* in two recent cases other than the one at bar. In *Estate of Goldwater* v. *Commissioner,* 64 T.C. 540 (1975), *appealed* No. 75-4277 (2d Cir.), the Tax Court refused to recognize a Mexican divorce in the face of a declaratory judgment entered in favor of decedent's first wife, holding that she remained his lawful wife. The court allowed the marital deduction to the extent property passed to his first wife by reason of her elective share under state law but denied the deduction to the extent property passed under decedent's will to the person who purported to be his wife at the time of his death. In *Estate of Spaulding* v. *Commissioner,* 34

CCH Tax Ct Mem ¶ 33,360 (1975), *appealed* No. 75-4248 (2d Cir.), the Tax Court followed its decision in *Goldwater* and in the case at bar to deny the marital deduction to the estate of the purported wife of a New York resident who had been divorced in Nevada but which divorce had been declared invalid by a New York court. At the time of decedent's death, she was a resident of California; but the court ruled that this did not change the result, because since all relevant parties had participated in the New York proceedings which resulted in the declaration that the divorce was invalid, California was required by *Sutton* v. *Leib,* 342 U.S. 402 (1952), to give the New York judgment full faith and credit and under California precedent would do so. The Tax Court has consistently maintained the view that marital status is defined by state law. *Estate of Lee* v. *Commissioner,* 64 T.C. 552 (1975), *appealed* (9th Cir.). *See Gersten* v. *Commissioner,* 28 T.C. 756 (1957), *aff'd in relevant part,* 267 F.2d 195 (9th Cir. 1959); *Eccles* v. *Commissioner,* 19 T.C. 1049 (1953), *aff'd per cur. for the reasons stated in the Tax Court opinion,* 208 F.2d 796.

There is support in opinions of courts of appeals for the distinction between income taxation and estate taxation. In *Borax* the Second Circuit did not rely solely on the goal of uniformity. On the contrary, it stated that the goal of uniformity might not alone be sufficient to justify the rule of validation. 349 F.2d at 670. It then indicated that the rule would further the Congressional purpose of allowing deductions where parties cease living together as husband and wife but would not interfere with any other tax policy. The court was influenced by the changes in the 1954 code which would allow the deduction of support payments incident to an agreement of separation but which did not apply to the transactions before the

court because they occurred before the effective date of the changes. Courts have in other contexts followed state law for purposes of estate taxation even when it would not apply to connected transactions for purposes of income taxation. *See Aldrich* v. *United States,* 346 F.2d 37 (5th Cir. 1965).

This court must analyze the meaning of the term "surviving spouse" in section 2056 in light of Congressional estate taxation purposes and only give limited weight to meanings other courts have ascribed to the term in other contexts. No one argues that Congress intended to create a body of federal marital law wholly independent from state law. The real issue which this court must decide in the present case is not whether to apply state or federal law; it rather must decide which jurisdiction's law should be recognized where a judgment of one jurisdiction is adjudged to be without validity in the controlling taxation jurisdiction although concededly the first judgment would have been recognized and sustained in other jurisdictions.

As indicated by the Tax Court's opinion in this case, section 2056 is intimately related to the law of the state where a decedent's estate is administered and where his property is located. The Tax Court carefully analyzed the various subdivisions of section 2056 and, citing various authorities, showed how they were connected with state law. A few of the more important examples are sufficient to demonstrate the nexus.

Section 2056 was primarily directed at equalizing the burden of estate taxes between residents of common law and community property states. In *United States* v. *Stapf,* 375 U.S. 118 (1963), the Supreme Court stated the purpose of the amendments to the Internal Revenue Code which now appear in section 2056:

> The 1948 tax amendments were intended to equalize the effect of the estate taxes in community property and common-law jurisdictions. Under a community property system . . . the spouse receives outright ownership of one-half of the community property and only the other one-half is included in the decedent's estate. To equalize the incidence of progressively scaled estate taxes and to adhere to the patterns of state law, the marital deduction permits a deceased spouse, subject to certain requirements, to transfer free of taxes one-half of the non-community property to the surviving spouse. Although applicable to separately held property in a community property state, the primary thrust of this is to extend to taxpayers in common-law States the advantages of "estate splitting" otherwise available only in community States.

Id. at 128 (footnote omitted). How the section operates depends on whether property is community property or separate property. This, in turn, depends on the law of the parties' domicile. If a person's estate contains community property interests, the estate's interest is deducted from the gross estate under section 2056(c)(2)(B) to arrive at the adjusted gross estate so that the estate will not receive the benefits of sections 2056.

Section 2056(e) defines when an interest in property will be considered to have passed within the meaning of the section. Each of the ways listed is dependent on state law, *e.g.,* by will, by intestacy, by dower, or by joint tenancy with the right of survivorship. State law also determines the nature of the property interest passing for purposes of the terminable interest rule of section 2056(b).

In light of these connections between section 2056 and the law of the state where decedent's property is administered and the Congressional purposes in enacting the section, we hold: When there are conflicting judicial de-

crees regarding the validity of a divorce, the decision should be followed for federal estate taxation purposes that would be followed by the state which has primary jurisdiction over the administration of a decedent's estate, *i.e.,* the jurisdiction in which the decedent was domiciled at the time of his death. This appears to be the position of the Tax Court, as indicated by its decisions in *Estate of Goldwater, supra,* 64 T.C. at 550, and *Estate of Spaulding, supra,* 4 CCH Tax Ct Mem at 1076. The position of the Commissioner, as represented by Rev. Rul. 67-442, *supra,* is that he will follow the last judicial decree by a court which has jurisdiction over the relevant parties. Though his rationale is not entirely clear, it appears his reason is that this would be the judgment entitled to full faith and credit by other states.

We note that while the rule we adopt works to the taxpayer's detriment in this case, the uniform application of the rule, which we would perceive to be required, could operate to deprive the Government of taxes in other situations. Thus, if Priscilla had predeceased Steffke, Wisconsin law would have put Crockett in the position of the surviving spouse. If, in such event, she had died intestate, then to the extent that Crockett would have inherited from her, the taxpaying estate would have been entitled to claim the marital deduction within the statutory limitation of amount. That it might not have been her desire that Crockett inherit from her is immaterial in determining the extent to which her estate would be subject to estate tax. Her wishes in respect to those who would share in her estate would have been within her control by the process of testamentary disposition, just as the matter of the taxability of Steffke's could have been controlled by her seeing to it that the severance from Crockett was one which would be recognized by the state of her domicile.

The estate in the present case relies on language in the Government's brief and language from the Senate Report on the bill which became section 2056 as providing an independent basis for allowing the marital deduction in this case. The Senate Report provides:

> The status of an individual as the decedent's surviving spouse is determined at the time of the decedent's death. A legal separation which has not (at the time of the decedent's death) terminated the marriage does not affect such status for the purposes of section 812(e)(1). . . .

Sen. Rep. No. 1013 (Part 2) 80th Cong. 2d Sess. at 6, 1948-1 Cum. Bull. 331, 335. The Government in another context paraphrases the report as indicating that judicial actions which have not terminated a marriage at the time of decedent's death have no effect on an individual's status as a surviving spouse. Citing ***Davidson* v. *Davidson,*** 35 Wis.2d 401, 151 N.W.2d 53 (1967), the estate argues that a purported marriage under Wisconsin law at a time when one of the parties has another spouse is voidable, not void, and that since decedent's marriage had not been declared invalid prior to his death, it must be treated as a valid marriage.

This court might properly consider this argument waived since it was neither presented to the Tax Court nor to this court in the estate's opening brief. The estate also had the opportunity to raise the issue before the Wisconsin Supreme Court so that it could rule on the exact meaning of *Davidson,* but it did not do so. We, nevertheless, have considered the argument and find it to be without merit.

Davidson was an action to annul a marriage. The action was brought by defendant's purported wife before her

death, and her estate sought to continue the action so as to obtain certain property. She and the defendant purported to become married several months before defendant's divorce from his first wife became final. Section 245.03(1) of the Wisconsin statutes then provided that it was unlawful for a person to marry within one year of a divorce judgment and that if a person attempted to marry within that time, the marriage was void. Section 245.02 defined "void" as used in the statutes to mean "null and void and not voidable." Section 245.24 indicated that under certain circumstances the law would treat a marriage as valid upon the removal of impediments such as the ones facing the parties in the *Davidson* case. The court held that notwithstanding the language of section 245.02, the marriage was voidable, not void, since it could be made valid. It further held that the marriage became valid at the time the impediments were removed, *i.e.,* one year after defendant's divorce became final, and therefore dismissed the action.

In the course of its opinion, the court quoted from 35 Am. Jur. *Marriage* § 57 at 220 (1941):

> A marriage which is merely voidable, however, is valid for all purposes until avoided or annulled in a proper proceeding during the lifetime of the parties. On the death of either spouse, the marriage cannot be impeached, and is made good ab initio.

151 N.W.2d at 55n.1 Am. Jur., however, continues:

> Of course, strictly speaking, a voidable marriage not annulled during the lifetime of the parties does not become valid by the death of one of the parties thereto, but rather becomes merely effective in that it can no longer be attacked. In other words . . . if [it is] not avoided during the lifetime of the parties in a proper proceeding, it has certain civil effects which cannot longer be controverted.

35 Am. Jur. *Marriage* § 57 at 220 (1941). (Footnote omitted.)

In the present case the Wisconsin Supreme Court was not faced with an annulment action in which one of the parties was attempting to roll back the clock and redefine property rights; rather, it was faced with the problem of determining the legal status of the parties at a time in the past so as to determine the appropriate inheritance tax rate to be applied in the present. The Wisconsin Court decided the issue. Since the parties did not argue the issue, we must assume that the court was conversant with its own precedent and can only conclude that the parties' tax status is not under the law of Wisconsin one of the "certain civil effects which cannot longer be controverted" after the death of a party.

In the construction of tax statutes, neither the Tax Court, nor this court in review, is sitting in the capacity of balancing the equities of a particular situation. The very phrase "avoidance of taxes," a legal objective, connotes that the same tax consequences do not necessarily flow from similar, but not identical, treatments of property and relationships. If we were deciding this case on some sort of a Solomonic basis, we could agree with the appellant that the result appears harsh when it is considered that this couple, who undertook the vows of marriage in a legal ceremony in Wisconsin and continued for more than a year apparently in the good faith belief that their relationship was not illicit, could have had no taint on their marriage if they had been domiciled in a state not many miles distant.

Congress, aware of an unfair discrepancy between the consequences of taxation on married couples in community

property law states and those in common law states, achieved a similarity of treatment by providing for the utilization of the marital deduction. We find nothing in the Code, however, dispensing with the necessity of the existence of the legal status of the marriage as a prelude to there being a surviving spouse situation. The plain meaning of the words "surviving spouse" can have no other meaning than that the person not only outlived but bore a particular relationship, here that of being a legal spouse.

It had been no unfathomable secret that hastily achieved divorces in foreign climes were suspect. Indeed, Steffke, for some reasoning not appearing in the record, himself secured a Wisconsin divorce subsequent to his own earlier Mexican decree. In the case before us the situation is not merely one in which there may have been a question as to the validity of foreign divorces generally, but here the highest court of the state of domicile specifically has held that the Steffkes at the time of his death were not spouses, thereby precluding the one who outlived from claiming to be a surviving spouse.

The underlying tenor of the appellants' argument would seem to be that the uniformity sought by Congress between community property law and common law states should be extended to any situation where more favorable treatment was given to taxpayers in another state. Counsel for the appellants conceded during oral argument that this extension would be equally applicable to a couple who purported to have engaged in a common law marriage in a state not recognizing this relationship if in fact other states would have considered the couple validly married. The application of principles of logic, however, has had no conspicuous place in the construction of taxation statutes.

It appears to us that Congress has achieved a simplistic uniformity by requiring one claiming to be a surviving spouse to be in law exactly that and to us "in law" does not mean what might have been true someplace else.

Perhaps the mores of the times do not place the high value on the sanctity of the continuance of the marital status as in previous years; but no matter how easily the status may now be discontinued, we are not presently persuaded when the state having the primary jurisdiction over a decedent's estate has specifically determined that a divorce elsewhere has provided no basis for a legal marriage, we can nevertheless say a marriage exists which would permit a spouse to survive upon the death of one.

Accordingly the judgment of the Tax Court is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

64 T. C. No. 50

UNITED STATES TAX COURT

ESTATE OF WESLEY A. STEFFKE, DECEASED, WISCONSIN VALLEY TRUST COMPANY and PRISCILLA BAKER LANE STEFFKE, co-executors, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4834-73 Filed July 8, 1975.

Decedent, a resident and domiciliary of Wisconsin who died testate on Nov. 1, 1968, left the bulk of his estate to his "friend, Priscilla Baker Lane," under his will executed on Jan. 30, 1967. She had obtained a Mexican divorce from Crockett W. Lane on June 9, 1966, and married decedent on July 3, 1967. The Mexican divorce was never declared invalid by the Mexican court that granted it, but it was held invalid by the Wisconsin Supreme Court in a case decided after decedent died.

Held, Priscilla Baker Lane Steffke was not the surviving spouse of decedent within the meaning of sec. 2056, I.R.C. 1954, and decedent's estate is not entitled to the marital deduction allowed by that section.

Leonard F. Schmitt, for the petitioner.

Rodney J. Bartlett, for the respondent.

OPINION

FEATHERSTON, *Judge:* Respondent determined a deficiency in the amount of $495,217.27 in petitioner's estate tax. The parties have settled several issues, and the only one remaining in dispute is whether, for purposes of the marital deduction, Priscilla Baker Lane Steffke was the

"surviving spouse" of decedent Wesley A. Steffke, within the meaning of section 2056(a).[1]

All the facts are stipulated.

Wesley A. Steffke (hereinafter decedent) died on November 1, 1968, a resident and domiciliary of the State of Wisconsin. Wisconsin Valley Trust Company (hereinafter the trust company) and Priscilla Baker Lane Steffke are the executors of decedent's estate. At the time the petition was filed herein, the trust company had its principal office in Wausau, Wisconsin, and Priscilla Baker Lane Steffke was a legal resident of the same city. The executors filed a Federal estate tax return with the District Director of Internal Revenue at Milwaukee, Wisconsin.

On May 31, 1930, decedent married Dorothy Nickelson Steffke. In 1964, he obtained a judgment of divorce from her in a court in the State of Chihuahua, Republic of Mexico. Decedent obtained a second divorce decree in the State of Wisconsin in 1965, dissolving the same marriage.

Priscilla Baker Lane Steffke (hereinafter Priscilla) had married Crockett W. Lane (hereinafter Crockett) on November 11, 1944. The State of Wisconsin was, at all times material hereto, the residence and domicile of both Priscilla and Crockett. Prior to June 9, 1966, while married to Crockett, Priscilla went to Mexico to obtain a divorce from him. She entered a personal appearance in an action for divorce in the First Civil Court of Bravos District (hereinafter the Mexican court), State of Chihuahua, Republic of Mexico. Crockett did not go to Mexico but entered a general appearance through counsel in the divorce proceed-

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[1] All section references are to the Internal Revenue Code of 1954, as in effect at the time of decedent's death, unless otherwise noted.

ing. Priscilla complied with the jurisdictional requirements prescribed by Mexican law. Immediately after her appearance in the Mexican court, she returned to her home in Wisconsin. A judgment of divorce was entered by the Mexican court on June 9, 1966, granting Priscilla a divorce on grounds not recognized under the laws of Wisconsin. This judgment of divorce was never vacated, voided, or set aside by the Mexican court which entered it.

On July 3, 1967, Priscilla and decedent took marriage vows in Marinette County, Wisconsin.

In his last will and testament, executed January 30, 1967, decedent provided that the overwhelming bulk of his estate would pass to his "friend, Priscilla Baker Lane," while most of the rest of the estate was to go to a trust of which his mother was a beneficiary.

By order dated January 17, 1973, the Probate Branch of the Court of Marathon County, State of Wisconsin, dètermined the identity of decedent's heirs-at-law for purposes of calculating State inheritance tax liability.[2] The order provides, in pertinent part:

> 2. That PRISCILLA BAKER LANE STEFFKE is found not to be the legal wife and widow of the decedent on the basis of the Court's decision that her divorce in Mexico from her former husband although presumptively valid where granted was not valid and binding in the State of Wisconsin.

On October 29, 1974, the Supreme Court of the State of Wisconsin affirmed the order of the Court of Marathon County, concluding in the final paragraph of its opinion,

[2] In practical terms, the issue was whether Priscilla's State inheritance tax liability would be computed at the rates applicable to widows or at rates applicable to "strangers" to decedent.

published as *In re Estate of Steffke,* 65 Wis. 2d 199, 222 N.W.2d 628, 633 (1974):

> The Mexican divorce granted to Priscilla Lane in 1966 is of no effect in the State of Wisconsin. She was not the wife of Wesley Steffke under the laws of the State of Wisconsin * * *[3]

In his notice of deficiency, respondent determined that since Priscilla was not decedent's surviving spouse within the meaning of section 2056, decedent's estate was not entitled to a marital deduction claimed on the estate tax return for the property passing to her. To support his determination, respondent relies on the decision of the Supreme Court of Wisconsin holding that Priscilla was not decedent's wife.

[3] The Wisconsin Supreme Court's opinion was based, in part, upon the provisions of sec. 247.21, Wis. Stat. Ann. (Cum. Supp. 1974), as follows:

> 247.21 Foreign decrees; comity of states; divorce abroad to circumvent laws
>
> Full faith and credit shall be given in all the courts of this state to a judgment of annulment of marriage, divorce or legal separation by a court of competent jurisdiction in another state, territory or possession of the United States, when the jurisdiction of such court was obtained in the manner and in substantial conformity with the conditions prescribed in s. 247.05. Nothing herein contained shall be construed to limit the power of any court to give such effect to a judgment of annulment, divorce or legal separation, by a court of a foreign country as may be justified by the rules of international comity. No person domiciled in this state shall go into another state, territory or country for the purpose of obtaining a judgment of annulment, divorce or legal separation for a cause which occurred while the parties resided in this state, or for a cause which is not ground for annulment, divorce or legal separation under the laws of this state and a judgment so obtained shall be of no effect in this state.

Petitioner maintains that on the date of decedent's death, decedent was married to Priscilla, contending that his marital status "for purposes of the federal tax statutes and specifically for purposes of determining the allowance of the marital deduction is controlled by Federal law." Citing *Borax' Estate* v. *Commissioner,* 349 F.2d 666 (2d Cir. 1965), revg. 40 T.C. 1001 (1963), cert. denied 383 U.S. 935 (1966); *Wondsel* v. *Commissioner,* 350 F.2d 339 (2d Cir. 1965), affg. in part and revg. in part a Memorandum Opinion of this Court, cert. denied 383 U.S. 935 (1966); and *Feinberg* v. *Commissioner,* 198 F. 2d 260 (3d Cir. 1952), revg. and remanding 16 T.C. 1485 (1951), petitioner contends that, for Federal tax law purposes, a divorce is valid unless it is declared invalid by the court that granted it. Since Priscilla's divorce was never declared a nullity by the Mexican court, the argument goes, the divorce remains valid for Federal tax purposes, and she was decedent's surviving spouse within the meaning of the marital deduction provisions of section 2056.

The parties have stipulated that Wisconsin was the residence and domicile of both Priscilla and Crockett. That State, therefore, had the dominant interest in the marital status of decedent and Priscilla. 2 Restatement, Conflict of Laws 2d, sec. 285. The judgment of the Supreme Court of that State, holding that Priscilla was not the wife of decedent, is entitled to full faith and credit. *Sutton* v. *Leib,* 342 U.S. 402, 409 (1952); *Williams* v. *North Carolina,* 325 U.S. 226, 227-230 (1945); *Williams* v. *North Carolina,* 317 U.S. 287, 291-304 (1942). Accordingly, petitioner can prevail in this case only if section 2056 uses the term "surviving spouse" in some special sense which would give validity to Priscilla's Mexican divorce from Crockett and her subsequent marriage to decedent, notwithstanding the Wisconsin Supreme Court decision, thus causing her to be

regarded, for the purposes of section 2056, as decedent's surviving spouse.

Section 2056 allows a deduction of an amount equal to the value of any interest in property passing from the decedent to the surviving spouse to the extent (1) such interest is not a terminable one and (2) the value thereof does not exceed 50 percent of the adjusted gross estate. This provision first came into the law as part of the Revenue Act of 1948, ch. 168, 62 Stat. 110, 117. Its basic purpose is to permit spouses to pass noncommunity property to their spouses and receive tax advantages comparable to those obtainable under a community property system if they give to the recipient spouse substantially the same property rights as a surviving spouse has or receives in community property. See H. Rept. No. 1274, 80th Cong., 2d Sess. (1948), 1948-1 C.B. 241, 261; S. Rept. No. 1013, 80th Cong., 2d Sess. (1948), 1948-1 C.B. 285, 305; *Northeastern Nat. Bank* v. *United States,* 387 U.S. 213, 219-221 (1967); *United States* v. *Stapf,* 375 U.S. 118, 128 (1963).[4]

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[4] The intimate relationship of sec. 2056 to State law is shown by the following description of the problem to which its predecessor section in the Rev. Act of 1948 was addressed, H. Rept.No. 1274, 80th Cong., 2d Sess. (1948), 1948-1 C.B. 241, 260:

> Prior to 1942 the taxation of transfers made by married persons depended upon the property law of the State in which the transfer took place. In community-property States only half of the community property belonged to one spouse. Hence only half could pass at his death, and only half could be subjected to the estate tax. * * * the consequence was a substantially lower tax on transfers in community-property States than on transfers of similar size in common-law States.
>
> In 1942 the Congress attempted to produce more nearly equal results. Amendments were passed which provided that in community-property States the entire community property was to be treated as the estate of the first spouse

(Footnote continued)

Section 2056 does not contain any special definition of the term "surviving spouse." Its meaning, of necessity, depends upon the marital status of the decedent, and there is no body of Federal Law from which the marital status of a decedent or his survivor can be ascertained. Marriage, its existence and dissolution, is particularly within the province of the States. *Marriner E. Eccles,* 19 T.C. 1049, 1051 (1953), affd. per curiam 208 F. 2d 796 (4th Cir. 1953); *Ruth Borax,* 40 T.C. 1001, 1007 (1963), revd. on other grounds 349 F.2d 666 (2d Cir. 1965), cert. denied 383 U.S. 935 (1966); *Albert Gersten,* 28 T.C. 756, 770 (1957), affd. on this issue 267 F. 2d 195 (9th Cir. 1959).

Petitioner is undoubtedly correct, however, in its position that, for tax purposes, the meaning of the term "surviving spouse" as used in section 2056 is a Federal question. State law may control the meaning of a term in a Federal taxing statute "only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law." *Lyeth* v. *Hoey,* 305 U.S. 188, 194 (1938); *United States* v. *Pelzer,* 312 U.S. 399, 402-403 (1941); *Burnet* v. *Harmel,* 287 U.S. 103, 110 (1932).

(Footnote continued)

to die, except such portion as could be shown to have been received "as compensation for personal services actually rendered" by the surviving spouse, or derived originally from such compensation, or from the separate property of the surviving spouse. * * *

* * * * * *

Unfortunately, the 1942 amendments did not produce complete geographical equalization. Cases exist in which transfers of community property are taxed more heavily than transfers under common law. Conversely, there are instances in which transfers in the common-law States are taxed more heavily.

Even though the section contains no express language on the subject, we think the "necessary implication" of section 2056, read as a whole,[5] is that the identification of a decedent's surviving spouse depends upon local law. The entire section is intimately related to the law of the State where the decedent's estate is administered and, in certain instances, the State where his property is located. The legal interests[6] for which the deduction is allowable depend upon local law, *Eggleston* v. *Dudley,* 257 F.2d 398, 400 (3d Cir. 1958), and an analysis of the section shows that where a State Supreme Court decision has adjudged the decedent's marital status the "necessary implication" is that the deduction is to be allowed only with respect to interests received by the person identified in that judgment as the decedent's spouse.

Thus, the marital deduction is allowed by section 2056 (a) only with respect to the value of "any interest in property which passes or has passed from the decedent to his surviving spouse." Subsection (e) of section 2056 provides that "an interest in property shall be considered as passing from the decedent to any person if and only if"

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[5] The legislative intent is to be drawn from the whole statute so that a consistent interpretation may be reached and no part will perish or be allowed to defeat another. *Hellmich* v. *Hellman,* 276 U.S. 233, 237 (1928); *United States* v. *Merchants Nat. Trust & Savings Bank,* 101 F2d 399, 404 (9th Cir. 1939); *Larkin* v. *United States,* 78 F2d 951, 954 (8th Cir. 1935).

[6] A classic statement of the relationship generally of State law to the estate tax is found in *Morgan* v. *Commissioner,* 309 U.S. 78, 80 (1940), and is as follows: "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."

it passes in certain defined ways. Paragraph (2) of that subsection lists an interest which is "inherited by such person from the decedent." The right of inheritance by one who is the surviving spouse of the decedent is governed by intestate succession statutes of the several States, including Wisconsin.[7] The "choices reflected by the intestate succession statute[s] are choices which it is within the power of the State to make," *Labine* v. *Vincent,* 401 U.S. 532, 537 (1971).

A special form of inheritance by a surviving spouse is a homestead interest. Where property is set apart by operation of law as the property of the surviving spouse and is exempt from execution to liquidate her husband's debts in her hands, it may qualify for the marital deduction. Cf. Rev. Rul. 55-419, 1955-1 C.B. 458. However, if the homestead interest is a terminable one, it does not so

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[7] Sec. 852.01, Wis. Stat. Ann. (1971), is, in part, as follows:

852.01 Basic rules for intestate succession

(1) Who are heirs. The net estate of a decedent which he has not disposed of by will, whether he dies without a will, or with a will which does not completely dispose of his estate, passes to his surviving heirs as follows:

(a) To the spouse:

1. If there are no surviving issue of the decedent, the entire estate;

2. If there are surviving issue all of whom are issue of the surviving spouse also, the first $25,000 (reduced, in case of partial intestacy, by any amount given the spouse by the will) plus one-half of the balance if there is only one surviving child and no surviving issue of a deceased child, or if only the issue of one deceased child survives, but one-third of the balance in other cases: • • •

qualify. *United States* v. *Hills,* 318 F.2d 56, 60 (5th Cir. 1963).[8]

Also, section 2056(a) has been interpreted to include allowances provided by State law for the support of a widow during the settlement of her husband's estate. If the allowance under the particular statute is a terminable interest, it does not qualify for the deduction. *Jackson* v. *United States,* 376 U.S. 503, 506 (1964). However, if the widow is absolutely entitled to the allowance and it will not abate upon her death or remarriage, it may qualify for the marital deduction. *Estate of Green* v. *United States,* 441 F.2d 303, 307-308 (6th Cir. 1971) (Michigan law); *Estate of Oliver B. Avery,* 40 T.C. 392, 400-401 (1963) (Missouri law); cf. *Bookwalter* v. *Phelps,* 325 F.2d 186 (8th Cir. 1963) (Missouri law).[9]

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[8] The current homestead provision in Wis. Stat. Ann. (1971) is, in part, as follows:

852.09 Assignment of home as part of share of surviving spouse

(1) If the intestate estate includes an interest in a home, the interest of the decedent is assigned to the surviving spouse as part of his or her share under s. 852.01 unless the surviving spouse files with the court at or before the hearing on the final account a written request that the home not be so assigned. • • •

[9] The provision in the Wis. Stat. Ann. (1971), for an allowance for the surviving spouse is, in part, as follows:

861.31 Allowance to family during administration

(1) The court may, without notice or on such notice as the court directs, order payment by the personal representative or special administrator of an allowance as it determines necessary or appropriate for the support of the surviving spouse and any minor children during the administration of the estate. • • •

A prior version of this statute was held not to qualify the allowance for the marital deduction. *Wiener's Estate* v. *United States,* 235 F.Supp. 919 (E.D. Wis. 1964).

Paragraph (3) of section 2056(e) provides that an interest in property is considered as passing from the decedent to the surviving spouse if "such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent." The right to dower or curtesy (or statutory interest in lieu thereof) depends upon State law,[10] and Wisconsin, like most other States, has its own special provision.[11] Whether such interest is includable in the marital deduction depends upon whether the surviving spouse receives an absolute interest which vests in her (or him) or receives a terminable interest, such as a life estate, and the nature

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[10] In *United States* v. *Crosby*, 257 F.2d 515 (5th Cir. 1958), the decedent was domiciled in Florida, where his estate was administered, but he owned some real property located in Alabama. The administrator found it necessary to sell that land to pay the estate's taxes and other debts. The court applied the law of Alabama in defining the nature of the widow's dower interest, holding that the amount which she received for such interest on the sale of the property qualified for the marital deduction. Cf. *Cox* v. *United States*, 421 F.2d 576, 581 (5th Cir. 1970).

[11] Under the Wisconsin statutes prior to 1971, a widow was entitled to dower. The inchoate dower right of the wife of any husband dying after Mar. 31, 1971, was abolished and replaced by an elective provision of the Wis. Stat. Ann. (1971), in part as follows:

861.05 Right to elective share; effect of election

(1) If decedent dies testate, the surviving spouse has a right to elect to take the share provided by this section. The elective share consists of one-third of the value of the net probate estate, reduced by the value of any property given outright to the spouse under the decedent's will. * * *

(2) Except as to property applied under sub. (1) to reduce the elective share, an election to take under this section forfeits any other right to take under the will and under the law of intestate succession. * * *

of her (or his) interest depends upon State law. See *United States* v. *Hiles*, 318 F.2d at 58.[12] Even where the dower interest is a terminable one, the commuted value of its sales proceeds may be deductible, depending upon the nuances of State law. ***United States* v. *Crosby*,** 257 F. 2d 515, 519 (5th Cir. 1958); see also ***Dougherty* v. *United States*,** 292 F.2d 331, 336-337 (6th Cir. 1961); ***United States* v. *Traders National Bank of Kansas City*,** 248 F.2d 667 (8th Cir. 1957); cf. *Cox* v. *United States*, 421 F.2d 576, 582-583 (5th Cir. 1970).

Finally, subsection (c)(1) of section 2056 limits the marital deduction to "50 percent of the value of the adjusted gross estate." Subsection (c)(2)(B) contains a special rule to be followed in computing the 50-percent limitation "If the decedent and his surviving spouse at any time, held properly as community property under the law of any State, Territory, or possession of the United States." For purposes of computing the marital deduction, the rule reduces the adjusted gross estate by the following items included therein: the value of the community property held at death, the value of transferred community property, the amount of insurance purchased with premiums paid out of community property, and certain other items. Community property is, of course, a State law concept, and the nature and extent of the community interest depends upon the applicable State law. ***Poe* v. *Seaborn*,** 282 U.S. 101, 110 (1930). Property belongs to a marital community

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[12] In *Cox* v. *United States*, 421 F.2d at 578, the court said: "Mrs. Cox elected to reject the provisions made for her in her husband's will and take her statutory share under Alabama law. The nature of the interests which she received are therefore governed by Alabama law."

only if the parties are husband and wife within the meaning of the local law. [13]

All of these provisions defining and circumscribing the marital deduction under section 2056—allowing the deduction on stated conditions for inherited interests, homestead rights, dower or interests in lieu thereof, and support allowances and denying it on stated conditions for described interests in community property—depend for their operation upon the marital status of the decedent and the identity of his surviving spouse under applicable State law. This list of provisions turning on State law does not purport to be complete, but it is sufficient to demonstrate the "necessary implication" that Congress intended, for the

[13] Community property laws are applicable in 8 States: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. The statutory definitions of community property differ to some extent, but the definitions in California and Texas are typical:

Calif. Civ. Code Ann. (West 1954):

Sec. 687. Community property defined

Community property. Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either. (Enacted 1872.)

Tex. Fam. Code Ann. (1975):

Sec. 5.01. Marital Property Characterized

(a) A spouse's separate property consists of:

(1) the property owned or claimed by the spouse before marriage;

(2) the property acquired by the spouse during marriage by gift, devise, or descent; and

(3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

(b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

purposes of section 2056, that applicable State law should control in determining a decedent's marital status and the identity of his surviving spouse. The language of the Supreme Court in *Helvering* v. *Stuart*, 317 U.S. 154, 161 (1942), an income tax case involving the taxability of trust distributions, is apposite:

> When Congress fixes a tax on the possibility of the revesting of property or the distribution of income, the "necessary implication," we think, is that the possibility is to be determined by the state law. Grantees under deeds, wills and trusts, alike, take according to the rule of the state law. The power to transfer or distribute assets of a trust is essentially a matter of local law. * * *

Similarly, where Congress circumscribes a deduction for property interests passing to a surviving spouse with State law concepts, the "necessary implication" is that the marital status of the decedent and the identity of the surviving spouse depend upon the law which creates those interests. Therefore, in the instant case, the judgment of the Wisconsin Supreme Court is controlling as to decedent's marital status. Priscilla was not his surviving spouse within the meaning of section 2056. Cf. *Ward* v. *Commissioner,* 224 F.2d 547, 551 (9th Cir. 1955), affg. 20 T.C. 332 (1953); *Estate of Margaret R. Gale,* 35 T.C. 215, 219 (1960).

Any other rule would render section 2056 unworkable. For example, under petitioner's view in the present case, had decedent died intestate no marital deduction would be allowable. Since Priscilla was not decedent's surviving spouse under Wisconsin law, she would have received no inherited property, dower or interest in lieu thereof, support allowances, or homestead rights which might otherwise qualify for the marital deduction. Only due to the fortuitous circumstances that decedent left a will giving

the bulk of his estate to Priscilla does petitioner have a basis for contending that the deduction is allowable. The anomalies would multiply if decedent's own Mexican divorce had been declared a nullity and he had not obtained the subsequent divorce under Wisconsin law. In those circumstances, Dorothy Nickelson Steffke would be his surviving spouse under Wisconsin law (unless she had died subsequent to their Mexican divorce or had divorced decedent legally under Wisconsin law), and as such would be eligible to inherit his intestate property, would be entitled to dower or interests in lieu thereof, and might qualify for the family allowance and homestead rights. Yet, if petitioner's position is correct, the marital deduction would be allowable only for the amounts passing to Priscilla.

In reaching the conclusion that, for the purposes of section 2056, Priscilla was not decedent's surviving spouse, we recognize that the appellate court opinions in *Borax' Estate* v. *Commissioner,* 349 F.2d 666 (2d Cir. 1965); *Wondsel* v. *Commissioner,* 350 F.2d 339 (2d Cir. 1965); and *Feinberg* v. *Commissioner,* 198 F.2d 260 (3d Cir. 1952), contain language which may be read to support petitioner's position that since Priscilla's Mexican divorce was not invalidated by the Mexican Court, that divorce should be regarded as valid for tax purposes. All three of those cases, however, involved the alimony income tax provisions of sections 71 and 215, with their separate legislative history and purpose, rather than the State-law-related marital deduction issue here presented, and on that ground they are distinguishable. Cf. *Aldrich* v. *United States,* 346 F.2d 37, 38 (5th Cir. 1965).

Borax involved also an issue as to whether the taxpayer whose Mexican divorce was later declared invalid by the Supreme Court of New York, New York County, was entitled, notwithstanding the New York court decree, to file a joint return with his second "wife". The provisions of section 6013, relating to joint returns, like the marital deduction provisions of section 2056, came into the tax law as part of the Revenue Act of 1948, ch. 168, 62 Stat. 110, 115, and were designed to put spouses in common law States on an equal footing with spouses in community property States. However, the marital deduction is more intimately related to State law and, for this reason, we think the joint return portion of the *Borax* opinion is also distinguishable from the instant case. If that distinction is not sound, we respectfully decline to follow the *Borax* opinion. See and compare *Harold K. Lee,* 64 T.C. No. 52, and *Estate of Leo J. Goldwater,* 64 T.C. No. 51, filed this day.

To reflect the disposition of other issues,

Decision will be entered under Rule 155.

Reviewed by the Court.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 867 — September Term 1975

Argued May 5, 1976 Decided June 29, 1976
Docket No. 75-4277

ESTATE OF LEO J. GOLDWATER, DECEASED, IRVING D. LIPKOWITZ, and LEE J. GOLDWATER, EXECUTORS,

Petitioners-Appellants,

-against-

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

(Filed June 29, 1976)

Before HAYS and MULLIGAN, Circuit Judges, and PALMIERI, District Judge*.

Appeal from an opinion of the United States Tax Court, 64 T.C. 540 (1975), disallowing an estate-tax marital deduction under 26 U.S.C. § 2056 because of a finding that decedent's second wife was not his "surviving spouse" for purposes of that section.

Affirmed.

IRVING D. LIPKOWITZ, New York, New York (Lipkowitz & Plaut, New York, New York, Roy Plaut, Peter Jason, of Counsel), for Petitioners-Appellants.

* Of the United States District Court, Southern District of New York, sitting by designation.

WILLIAM S. ESTABROOK, III, Attorney, Tax Division, Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Washington, D.C., Gilbert E. Andrews, Elmer J. Kelsey, Attorneys, Tax Division, Department of Justice, Washington, D.C., of Counsel), for Respondent-Appellee.

MULLIGAN, Circuit Judge:

This appeal presents this court with the problem of determining who is the "surviving spouse" of the decedent Leo J. Goldwater for purposes of the estate-tax marital deduction authorized by the Internal Revenue Code of 1954, 26 U.S.C. § 2056.[1]

The facts have been stipulated and are as follows: On June 20, 1946 Leo married his first wife Gertrude in New York City, where they resided as man and wife until about June 1955.[2] In December 1956 Gertrude was awarded a final decree of separation from Leo by the New York State Supreme Court, New York County. On March 20, 1958, Leo obtained a Mexican decree of divorce from Gertrude, without an appearance by her.

On October 16, 1958, Gertrude commenced an action against Leo in the New York State Supreme Court, based on two causes of action: the first was for a declaratory judgment decreeing the invalidity of the Mexican divorce, and the second sought permanently to enjoin Leo from remarrying, in New York or elsewhere. In addition, Gertrude made a successful motion for a temporary injunction against Leo's remarriage during the pendency of the action. Leo appealed from the granting of the temporary injunction and from the denial of his own cross-motion in the trial court to strike the second cause of action (seeking a permanent injunction against his re-

marriage). On December 9, 1958, the New York Supreme Court, Appellate Division, First Department issued an opinion reversing the order denying Leo's cross-motion to dismiss the second cause of action, and vacating the temporary injunction against remarriage. *Goldwater* v. *Goldwater,* 6 App. Div. 2d 561, 180 N.Y.S. 2d 383. The court noted that Leo's "answering affidavit admits the invalidity of his Mexican divorce and asserts that he will not oppose plaintiff's [Gertrude's] action for a declaratory judgment." 180 N.Y.S. 2d at 384.

Freed of the injunction against his remarriage, on the very same day that the Appellate Division handed down its decision Leo married "wife" number two, Lee, in Connecticut. At all times thereafter and up until his death, Leo resided with Lee as man and wife in New York.

Thereafter, on February 17, 1959, the New York Supreme Court issued a declaratory judgment in the action instituted by Gertrude. *Inter alia* it declared and adjudged:

—that the Mexican divorce of Gertrude and Leo "was and is fraudulent, null, void and of no force and effect whatsoever;"

—that the alleged marriage of Leo and Lee was likewise null and void;

—"[t]hat the plaintiff Gertrude B. Goldwater is, and at all times since June 20, 1946 has been, the lawful wife of the defendant Leo J. Goldwater."

The second cause of action (for an injunction against Leo's one month after his demise. That will bequeathed to Lee appeared in this declaratory judgment action, second wife Lee was never joined as a defendant in that suit. No appeal was ever taken from this declaratory judgment and hence it has become final.

Leo died on February 21, 1968. His last will and testament, dated January 17, 1964, was admitted to probate in the Surrogate's Court, New York County, approximately one month after his demise. This will bequeathed to Lee an interest in property equal to or greater than fifty per cent of the value of the adjusted gross estate.[3]

On April 11, 1968, Gertrude filed a notice to take an elective share of Lee's estate pursuant to N.Y. E.P.T.L. (Estates, Powers and Trusts Law) § 5-1.1 ("Right of election by surviving spouse"). This claim was settled by Leo's executors approximately a year later for the amount of $205,000; the settlement was approved by the Surrogate's Court on April 25, 1969.

The estate-tax return for Leo's estate claimed a full marital deduction of $395,242.17, representing the fifty percent of the adjusted gross estate which was left to Lee. By notice of deficiency the I.R.S. allowed a marital deduction of only $206,103.26, the amount left to Gertrude,[4] since, according to the I.R.S., "Lee J. Goldwater does not qualify as the surviving spouse within the meaning of Section 2056. . . ." Thus $189,138.91 of the claimed marital deduction was disallowed, resulting in an asserted deficiency in the estate tax of $73,284.86.

Leo's executors petitioned the Tax Court for a review of the claimed deficiency. In an opinion by Judge Irene F. Scott filed on July 8, 1975, which is reported at 64 T.C. 540, that court found in favor of the I.R.S., since it concluded "that Gertrude and not Lee was decedent's 'surviving spouse' within the meaning of section 2056." In so finding the court relied heavily on the New York court's declaratory decision which held that Gertrude, and not Lee, was Leo's lawful spouse.

Pursuant to that opinion the Tax Court found a deficiency of $51,709.19. This appeal followed.

We affirm the decision of the Tax Court. It seems clear that Gertrude and not Lee was Leo's spouse at the time of his death. Leo and Gertrude were married and resided in the State of New York; a New York State court found Leo's subsequent Mexican divorce to be "fraudulent, null, void and of no force and effect whatsoever," and in fact Leo admitted as much in his affidavit in the proceeding. Although Leo then married Lee in Connecticut, he at all times thereafter resided with her in New York. He died a resident of New York and his will was offered for probate in the New York Surrogate's Court. Under these facts the New York decree must be respected and Gertrude recognized as his surviving spouse.

This court was recently faced with a similar question in *Estate of Spalding* v. *CIR,* slip op. 4241 (2d Cir. June 18, 1976), but the facts in that case are clearly distinguishable from those presented here. In *Spalding,* Charles and Elizabeth were married in Pennsylvania, and thereafter resided in Connecticut until Charles moved to New York leaving Elizabeth in Connecticut. Charles then obtained a Nevada divorce serving Elizabeth in Vermont. The New York Supreme Court then declared that the Nevada divorce was void. Charles thereupon married Amy in California where they continued to reside until Amy's death in that state. Amy's last will and testament was offered for probate in California. We held in *Spalding* that Amy's estate was entitled to the marital deduction since Charles was her "surviving spouse" under section 2056(a). In reaching that conclusion Judge Moore in his opinion pointed out that the Tax Court in making a contrary determination had relied upon its decisions in *Estate of Wesley A. Steffke,* 64 T.C. 530 (1975) (now on appeal in the Seventh Circuit) and *Estate of Leo J. Goldwater,* 64 T.C. 540 (1975) (this appeal). In distinguishing those cases Judge Moore stated that they had held that "where a prior divorce had been ruled invalid by *a court of the state where*

the decedent's estate was being administered, the 'surviving spouse' requirement of § 2056(a) was not satisfied." Id. at 4245 (emphasis in original). In *Spalding,* as Judge Moore indicated, it was Amy's estate which was being administered and "[i]t is her property and her tax with which he [the Commissioner] is dealing." Id. at 4247. Here of course it is Leo's estate which is at issue; it was administered by the State of New York where he was domiciled and where a court of that state had held his divorce and "remarriage" to Lee to be invalid and of no force and effect. We consider that there is no alternative but to follow the law of New York and hold that Gertrude is his "surviving spouse" and that Lee does not qualify as such within the meaning of section 2056.

Appellant argues that our holding in *Estate of Borax* v. *CIR,* 349 F.2d 666 (2d Cir. 1965) (2-1, Friendly, C.J., dissenting), cert. denied, 383 U.S. 935 (1966), followed in *Wondsel* v. *CIR,* 350 F.2d 339 (2d Cir. 1965) compels the holding here that Lee must be regarded as Leo's surviving spouse. However, *Borax* was concerned with the provisions of the federal income tax law concerning the deductibility of alimony payments. The court carefully so limited its holding: "We hold, *for purposes of these provisions* [26 U.S.C. §§ 71,215] of the federal tax statute, and *within the meaning of these provisions,* that for the years in dispute Ruth [the first wife] and Herman were divorced under a decree of divorce. The subsequent declaration of invalidity by a jurisdiction other than the one that decreed the divorce is of no consequence *under these provisions of the tax law.*" 349 F.2d at 670 (emphasis added).

The court also noted that the 1954 Tax Code afforded the same tax treatment to support payments where the husband and wife were separated under a written separation agreement, as when they were formally divorced. Hence, "[i]f support payments are includible in the gross income

of the wife and deductible by the husband when the parties are voluntarily separated, the same treatment should obtain when the husband and wife are 'divorced' in the sense in which Ruth and Herman were divorced—they ceased living together as husband and wife, they lived separately, and one party had obtained a decree dissolving the marital status, although the other had the decree declared 'invalid' by a court of another jurisdiction." Id. at 670-71.

For estate tax purposes, in determining the surviving spouse, there is no comparable flexibility in the provisions of section 2056. Judge Moore has candidly stated in his opinion in *Spalding* (slip op. at 4246) that *Borax* and *Wondsel* have been criticized by legal scholars. See, e.g., Spolter, Invalid Divorce Decrees, 24 Tax L. Rev. 163 (1969); Case Note, 40 N.Y.U. L. Rev. 992 (1965). Whether or not *Borax* was properly decided and whether it promotes uniformity or cavalierly ignores local law, is not now in issue. As we have indicated, *Borax* explicitly limits its holding to the income tax issue there involved and does not purport to set forth a universal rule of tax code construction.

Appellant urges that even if *Borax* is not binding, the New York declaratory judgment is invalid since Lee was an indispensable party who was not joined as a defendant. The New York cases relied upon and those we have discovered are not in point. In all of these cases [5] it appears that the defendant spouse contested the judgment and asserted the validity of the divorce. Here, on the contrary, Leo by affidavit conceded that the Mexican decree he obtained was invalid. The marital relationship subsisting between Leo and Gertrude could only be impugned by a valid divorce and not by a subsequent relationship between Leo and Lee. See *Somberg* v. *Somberg*, 263 N.W. 1, 188 N.E. 137 (1933). There is nothing in the record before us to give any basis for questioning the finding of the New York court that the Mexican divorce decree was a nullity. If Leo conceded this in the New York action, we cannot imagine what contribution Leo could have made to that litigation. We have not yet reached the stage where a subsequent "marriage" destroys the marital rights of the first wife without an intervening valid dissolution of the marital status.

We therefore affirm the decision of the Tax Court.

FOOTNOTES

[1] That section reads in pertinent part:

> (a) Allowance of marital deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall . . . be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

[2] Both Gertrude and Leo were New York residents from the time of their marriage until the time of his death on February 21, 1968.

[3] Obviously this was done to qualify for the maximum possible estate-tax marital deduction. 26 U.S.C. § 2056(c)(1).

[4] The $205,000.00 settlement plus a life insurance policy of $1,103.26 which named Gertrude as beneficiary.

[5] E.g., *Cominos* v. *Cominos,* 23 App. Div. 2d 769, 258 N.Y.S. 2d 545 (2d Dep't), appeal dismissed, 16 N.Y. 2d 1074, 213 N.E. 2d 687, 266 N.Y.S. 2d 393 (1965); *Bard* v. *Bard,* 16 App. Div. 2d 801, 228 N.Y.S. 2d 294 (2d Dep't 1962); *Varrichio* v. *Varrichio,* 269 App. Div. 678, 53 N.Y.S. 2d 326 (2d Dep't), leave to appeal to the Court of Appeals denied, 56 N.Y.S. 2d 527 (2d Dep't 1945); *Lauricella* v. *Lauricella,* 14 Misc. 2d 625, 178 N.Y.S. 2d 561 (Sup. Ct. 1958).

APPENDIX D

26 U.S.C. Sec. 6013(a): Sec. 6013 IRC 1954: (a) Joint Returns—A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions, except as provided below:

Not applicable